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5 UNITED STATES DISTRICT COURT
6 DISTRICT OF NEVADA
7

8 STEWART HANDTE,

Plaintiff,

CASE NO. 3:10-CV-00111-LRH-RAM

9 vs.

10 JAMES G. MILLER, an individual; STOREY
11 COUNTY, a political subdivision of the State
of Nevada; GERALD ANTINORO, an
12 individual,

13 Defendants.
14

DEFENDANTS' REPLY
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF THEIR
MOTION TO DISMISS PLAINTIFF'S
FIRST AMENDED COMPLAINT
PURSUANT TO FRCP 12(b)(6)

15 COME NOW Defendants, JAMES G. MILLER, STOREY COUNTY and GERALD
16 ANTINORO (collectively "Defendants,") by and through their attorneys, Thorndal, Armstrong,
17 Delk, Balkenbush & Eisinger, and hereby submit their reply memorandum of points and
18 authorities in support of their motion to dismiss Plaintiff's First Amended Complaint.

19 By way of the filing of the instant reply, Defendants will attempt to address the major
20 issues of law discussed in Plaintiff's opposition. However, it is respectfully submitted that the
21 failure to address any specific issue of law raised by Plaintiff is not to be taken as an admission
22 of same by Defendants.

23 **I. INTRODUCTION**

24 Plaintiff, Stewart Handte ("Plaintiff"), filed his First Amended Complaint against
25 Defendants on March 22, 2010. Generally, Plaintiff claims that he was constructively discharged
26 from his position as a Deputy Sheriff in violation of his First Amendment rights based, in part,
27 for criticizing both the manner in which the Storey County Sheriff's Office ("Sheriff's Office")
28 conducted an internal investigation of his conduct and the manner in which it carried out its
firearms training.

1 In an effort to distract the Court, Plaintiff creatively spins the facts contained in his
 2 amended complaint and cites to authority which is not applicable to this case. Plaintiff would
 3 have this Court believe that he spoke out on matters of corruption or wrongful conduct by
 4 government officials, and addressed concerns which pertained to the evaluation of the Sheriff's
 5 Office. However, a simple review of the allegations contained on the face of Plaintiff's First
 6 Amended Complaint reveals that Plaintiff's claims are meritless. As will be discussed below,
 7 Plaintiff's alleged speech solely concerned his own personal interests and his individual
 8 employment dispute with the Sheriff's Office. Plaintiff's alleged speech did not concern the
 9 public. Such speech is not protected by the United States Constitution, and therefore, Plaintiff's
 10 Complaint fails to state a valid First Amendment claim.

11 Plaintiff also amended his original complaint by improperly asserting additional claims
 12 which are time-barred. The allegations which support Plaintiff's claims for defamation and
 13 violation of the Family Medical Leave Act occurred over two (2) years prior to the date he filed
 14 this lawsuit. As such, these claims must be dismissed.

15 Plain and simply, all of Plaintiff's claims must be dismissed as there are no set of facts
 16 which would entitle him to relief.

17 II. LEGAL ANALYSIS

18 A. Plaintiff's Claims Against Lieutenant Antinoro Must be Dismissed

19 Any and all claims asserted against Gerald Antinoro ("Lieutenant Antinoro") must be
 20 dismissed because Plaintiff's First Amended Complaint fails to allege any facts of wrongdoing
 21 by Lieutenant Antinoro which could give rise to a constitutional violation. The only action
 22 which Lieutenant Antinoro is alleged to have engaged in, is participating in the decision to
 23 suspend Plaintiff. *See* Plaintiff's Opposition, p.1. Plaintiff alleges no facts whatsoever in his
 24 amended complaint which would indicate that Lieutenant Antinoro's decision to suspend
 25 Plaintiff was motivated by retaliation. Plaintiff's amended complaint only contains mere
 26 conclusory statements, which are insufficient to survive a motion to dismiss. *See Aschroft v.*
 27 *Iqbal*, 129 S. Ct. 1937, 1949-50 (2009).

28 ///

1 Lieutenant Antinoro recommended the suspension of Plaintiff for his accidental discharge
 2 of a firearm. This is evident from the Face of Plaintiff's Complaint. Plaintiff alleges that in July
 3 of 2008, the Sheriff's Office conducted an investigation of Plaintiff for the discharge of a firearm
 4 at the shooting range. See ¶ 11 of Plaintiff's First Amended Complaint. Thereafter, Plaintiff was
 5 issued a two (2) day suspension by Lieutenant Antinoro. See ¶ 12 of Plaintiff's First Amended
 6 Complaint. It is noteworthy that in his original complaint, Plaintiff acknowledged that the
 7 discharge of his weapon was accidental and was indeed the reason for his suspension. Plaintiff
 8 conveniently omitted that language when he filed his First Amended Complaint. Further, in his
 9 First Amended Complaint, Plaintiff never denies that he accidentally discharged his firearm at
 10 the shooting range. In his First Amended Complaint, Plaintiff alleges that "[t]he investigation
 11 was a ruse to create discipline for Plaintiff." See ¶ 11 of Plaintiff's First Amended Complaint.
 12 Plaintiff also alleges that the Defendants did not appreciate Plaintiff's speech, and determined a
 13 two (2) day suspension as a result. See ¶ 17 of Plaintiff's First Amended Complaint. Other than
 14 these conclusory statements, there are no facts in Plaintiff's amended complaint which would
 15 indicate that Lieutenant Antinoro had retaliatory motives or retaliatory intent when participating
 16 in the decision to suspend Plaintiff.

17 The claims asserted against Lieutenant Antinoro cannot withstand the instant motion
 18 because there are no facts in Plaintiff's First Amended Complaint which support the mere
 19 conclusory statements that Lieutenant Antinoro suspended Plaintiff for engaging in speech. In
 20 *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) and *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), the
 21 United States Supreme Court analyzed the necessary requirements of a complaint which are
 22 necessary to survive a motion to dismiss. Federal Rule of Civil Procedure 8(a)(2) demands that a
 23 pleading contain a "short and plain statement of the claim showing that the pleader is entitled to
 24 relief." While the Supreme Court noted that this pleading standard does not require detailed
 25 factual allegations, it stated that "it demands more than an unadorned, the defendant-unlawfully-
 26 harmed-me accusation." *Ashcroft*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555, 127 S.
 27 Ct. 1955). "A pleading that offers 'labels and conclusions' or a formulaic recitation of the
 28 elements of a cause of action will not do." *Id.* Nor does a complaint suffice if it tenders "naked

1 assertion[s]’ devoid of ‘further factual enhancement.’” *Id.*

2 In *Ashcroft*, the Court went on to state that “[t]o survive a motion to dismiss, a complaint
3 must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible
4 on its face.’” *Ashcroft*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570, 127 S. Ct. 1955).
5 Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops
6 short of demonstrating that a claim is plausible. *Ashcroft*, 129 S. Ct. at 1249. The principle that
7 a court must accept as true all of the allegations contained in a complaint is inapplicable to legal
8 conclusions. *Id.* “Threadbare recitals of the elements of a cause of action, supported by mere
9 conclusory statements do not suffice.” *Id.*

10 In the instant matter, Plaintiff sets forth only conclusory statements that Lieutenant
11 Antinoro acted with retaliatory intent and that his decisions were based on Plaintiff’s speech. As
12 such, these statements must not be accepted as true. Because Plaintiff’s amended complaint is
13 devoid of any factual allegations of retaliatory intent or that Plaintiff’s speech was the substantial
14 or motivating factor for Lieutenant Antinoro’s actions, Plaintiff’s claims against Lieutenant
15 Antinoro must be dismissed.

16 Even if this Court were to determine that Plaintiff’s Amended Complaint contained
17 sufficient factual allegations, the dismissal of Plaintiff’s claims against Lieutenant Antinoro is
18 warranted because Plaintiff’s theory of causer liability has no merit. In his Opposition, Plaintiff
19 cites to the case of *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) in arguing that any
20 recommendations by Lieutenant Antinoro to suspend Plaintiff are actionable under § 1983
21 because he caused each adverse employment action. See Plaintiff’s Opposition, p.1. In *Johnson*,
22 the Ninth Circuit Court of Appeals stated that an individual may be liable under 42 U.S.C. §
23 1983 when he sets in motion a series of acts that he knows or reasonably should know will cause
24 another to inflict constitutional injury. 588 F.2d at 743-744. In the case at bar, Plaintiff’s
25 amended complaint is completely void of any facts which would demonstrate that Lieutenant
26 Antinoro knew or reasonably should have known that making a recommendation to suspend
27 Plaintiff for the inappropriate discharge of a firearm would lead to some type of constitutional
28 violation. Suspensions of employees are often justified and do not constitute constitutional

violations. As stated above, Plaintiff's First Amended Complaint indicates that Plaintiff was suspended for firing a weapon at the shooting range. Plaintiff was suspended for actions which compromised the safety of other employees of the Sheriff's Office. Such action does not constitute a constitutional injury. *See Strahan v. Kirkland*, 287 F.3d 821, 825 (9th Cir.2002) (recognizing that a First Amendment retaliation claim fails when an adverse employment action was taken for legitimate, non-discriminatory reasons). Because there are no factual allegations to support the notion that Lieutenant Antinoro knew or should have known that his actions would lead to a constitutional deprivation, he cannot be held liable under a theory of causer liability.

B. No Actionable Policy or Custom Exists in the Instant Matter Which Gives Rise to Liability Under 42 U.S.C. § 1983 as Against Storey County

Storey County cannot be liable for the actions of James Miller (hereinafter "Sheriff Miller") because he did not commit or ratify a constitutional violation. Plaintiff argues that the decisions or actions of Sheriff Miller constituted county policy because he is the final policymaker with respect to personnel matters at the Sheriff's Office. In *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996), the Ninth Circuit set out three ways in which a plaintiff can establish a § 1983 claim against a municipality. A plaintiff's complaint must demonstrate facts to support one of the following scenarios: (1) that a policy or custom of the municipality gave rise to his or her injuries; (2) that the individual who committed the constitutional tort was an official with final policy-making authority such that the challenged action itself constitutes official government policy; or (3) that the official with policy-making authority ratified a subordinate's unconstitutional decision or action and the basis for it. *Id.*

While Sheriff Miller may be the final policy-maker with regard to personnel matters regarding deputy sheriffs in Storey County, Plaintiff cannot prevail against Storey County because Sheriff Miller did not commit a constitutional tort by suspending Plaintiff, and Sheriff Miller did not ratify a recommendation or decision which was unconstitutional. As will be discussed below, Plaintiff cannot allege a constitutional violation because he never engaged in protected speech, and any alleged speech was not a substantial or motivating factor for Plaintiff's suspension. Because Sheriff Miller neither committed a constitutional tort nor ratified a decision

1 which was unconstitutional, Plaintiff's claims against Storey County must be dismissed.

2 **C. Plaintiff's Claims Premised Upon First Amendment Retaliation Under 42 U.S.C. §**
 3 **1983 Must be Dismissed**

4 Plaintiff's claims for First Amendment retaliation must be dismissed because he is not
 5 entitled to relief based on the allegations set forth in his First Amended Complaint.

6 **(1) Plaintiff's Speech Did Not Address Matters of Public Concern**

7 Determining whether the speech at issue addressed matters of public concern is purely a
 8 question of law. *Posey v. Lake Pend Oreille School District No. 84*, 546 F.3d 1121, 1126 (9th
 9 Cir. 2008) (quoting *Freitag v. Ayers*, 468 F.3d 528, 543 (9th Cir. 2006)). As stated in
 10 Defendants' motion to dismiss, the Ninth Circuit has repeatedly held that speech pertaining to
 11 internal personnel disputes and grievances does not address matters of public concern. *See Voigt*
 12 *v. Savell*, 70 F.3d 1552, 1560 (9th Cir. 1995). It is well established that the Plaintiff bears the
 13 burden of showing that his speech addressed matters of public concern based on the content,
 14 form, and context of his statements. *See Desrochers v. City of San Bernardino*, 572 F.3d 703,
 15 709 (9th Cir. 2009). In the analysis of form and context, the court focuses on the purpose of the
 16 speech, and considers such factors as the employee's motivation and the audience chosen for the
 17 speech. *See Ulrich v. City & County of San Francisco*, 308 F.3d 968, 979 (9th Cir. 2002). In the
 18 instant matter, Plaintiff is not entitled to relief because he did not engage in speech which is
 19 protected by the First Amendment. Plain and simply, Plaintiff's alleged speech related to a
 20 grudge he had with his employer, and did not address matters of public concern.

21 In Plaintiff's Opposition, he attempts to distract this Court by disingenuously arguing that
 22 his speech addressed a variety of matters which concerned the broader rights of officers and the
 23 public. Nothing could be further from the truth. Plaintiff has converted his private employment
 24 dispute into a vendetta against the entire Sheriff's Office and the individual Defendants by
 25 asserting meritless claims for violations of his constitutional rights. Plaintiff also improperly sets
 26 forth allegations that had nothing whatsoever to do with any legitimate issue in this case. Where
 27 as here, a plaintiff misuses the judicial system under the guise of a civil rights action as a forum
 28 to air a personal grudge regarding the management style of his supervisors, courts have held that

1 such suits are frivolous. *See Kennedy v. McCarty*, 803 F. Supp. 1470, 1474-75, 1478 (S.D. Ind.
 2 1992). Courts have also determined that suits are meritless when the plaintiff transforms a
 3 dispute with his employer into alleged violation of his constitutional rights and attacks individual
 4 defendants. *See Murphy v. Bd. of Educ. Of Rochester City Sch. Dist.*, 420 F. Supp. 2d 131, 136-
 5 37 (W.D.N.Y. 2006). In making a determination for attorney's fees, the court in *Murphy*
 6 discussed circumstances under which a lawsuit is meritless:

7 Plaintiff took a run-of-the-mill dispute with his employer and not only
 8 transformed it into an alleged violation of his constitutional rights-which it was
 9 not-but deliberately inflated it into a massive, multi-front legal offensive against
 10 the [defendants]. He did so in large part by means of ad hominem attacks on the
 individual defendants . . . and by injecting into the case allegations that had
 nothing whatsoever to do with any legitimate issues in the case.

11 Id. While a motion for attorneys' fees is not currently before this Court, *Murphy* demonstrates
 12 how Plaintiff's claims lack merit. A simple reading of the First Amended Complaint shows that
 13 Plaintiff's speech consisted of nothing more than an expression of his dissatisfaction with the
 14 manner in which the Sheriff's Office handled his individual personnel dispute regarding the
 15 accidental discharge of his firearm at the shooting range. Plaintiff complained that a thorough
 16 Internal Affairs investigation over the incident had not been completed, and that he had not been
 17 interviewed. *See* ¶ 14 of Plaintiff's First Amended Complaint. Plaintiff's alleged speech
 18 occurred during a grievance meeting only after it was recommended that he receive a suspension
 19 for his improper conduct, which further shows that his speech was nothing more than a reaction
 20 and disagreement regarding the potential discipline that he faced. *See* ¶¶ 4 and 12 of Plaintiff's
 21 First Amended Complaint, and Plaintiff's Opposition, p.3. Plaintiff's speech only concerned his
 22 own position and the manner in which he was treated as an individual. Unfortunately for
 23 Plaintiff, private speech which challenges the investigation and punishment for a violation of
 24 department policy is not protected by the First Amendment. *See City of San Diego v. Roe*, 543
 25 U.S. 77, 83-84, 125 S. Ct. 521, 526 (2004).

26 Plaintiff's reliance on the case of *Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917 (9th
 27 Cir. 2004) to support his assertion that speech may address matters of public concern even when

1 the speech concerns a single person's grievance is misplaced.¹ *Hansen* is distinguishable from
 2 this case because the plaintiff in *Hansen* was not a party to the grievance. *Id.* at 921-923. In
 3 *Hansen*, the plaintiff claims that he was retaliated against for speaking about matters of public
 4 concern while he testified as a witness and submitted sworn affidavits for a former employee's
 5 grievance hearing. *Id.* A public employee's speech in support of a co-worker's grievance is
 6 treated differently from employment grievances in which the employee himself is complaining
 7 about his own job treatment. *Id.* at 927 n.6; *Thomas v. City of Beaverton*, 379 F.3d 802, 808 (9th
 8 Cir. 2004). In the case at bar, Plaintiff's speech was made at his own grievance hearing and
 9 concerned his own personnel dispute. Because Plaintiff's speech concerned his own job status,
 10 his speech is not protected by the First Amendment. *Id.* Furthermore, in *Hansen*, the plaintiff's
 11 speech exposed race and age discrimination by a governmental employer. *Hansen*, 381 F.3d at
 12 925. In the instant matter, Plaintiff's speech did not relate to matters of political, social, or other
 13 concern to the community, and therefore he did not engage in protected speech.

14 Plaintiff argues that he spoke on matters of public concern by making the conclusory
 15 statement that the internal affairs investigation into his conduct violated Nevada law, but he fails
 16 to specify what particular statute is implicated and how the Sheriff's Office failed to comply with
 17 the law. *See* Plaintiff's Opposition, p.3. As stated previously, legal conclusions are not to be
 18 accepted as true when a court makes a determination on a motion to dismiss. *See, Ashcroft*, 129
 19 S. Ct. at 1249. In Plaintiff's First Amended Complaint, he only makes a general reference to
 20 Chapter 289 of the Nevada Revised Statutes which addresses a variety of issues concerning peace
 21 officers, and he fails to allege specific facts which would support his assertion that the Sheriff's
 22 Office engaged in any unlawful conduct. Moreover, even if Plaintiff did identify a statute which
 23 was violated by the Sheriff's Office, his speech would not address matters of public concern if
 24 the statute governs the internal employment actions of law enforcement agencies which do not
 25 address public safety. *See Simontacchi v. Nevada Department of Public Safety*, 2009 WL

26
 27 ¹ The cases which are cited by Plaintiff in arguing that speech may address matters of public concern even when
 28 made for the purpose of addressing a personal grievance are inapposite. The cases cited by Plaintiff are based on facts
 which are entirely different from the case at bar.

1 803119 *7 (D. Nev. March 25, 2009). This case has been attached hereto as Exhibit 1 pursuant
 2 to Ninth Circuit Rule 36-3 and Fed. R. App. P. 32.1. Accordingly, Plaintiff's First Amended
 3 Complaint fails to sufficiently allege any violation of Nevada law by Defendants.

4 Plaintiff's First Amended Complaint also alleges that he made complaints regarding the
 5 firearms training policy and wages, but those comments were clearly a by-product of Plaintiff's
 6 internal personnel dispute. The form and context of the Plaintiff's statements demonstrate that
 7 the speech was merely intended to highlight a workplace grievance rather than provide
 8 information relevant to the public's evaluation of the Sheriff's Office. Moreover, the allegations
 9 concerning statements made by Plaintiff's representative regarding employee overtime had
 10 nothing whatsoever to do with Plaintiff's personnel dispute. Plaintiff's representative simply
 11 addressed the overtime issue while he was present at the administrative hearing on July 24, 2008,
 12 and those comments in no way, shape, or form relate to this case. Furthermore, Plaintiff fails to
 13 identify a statute which is implicated by the overtime policy that pertains to issues other than the
 14 internal employment actions of law enforcement agencies. *Id.* Accordingly, Plaintiff's speech
 15 did not address matters of public concern.

16 Plaintiff's alleged complaints regarding the firearms training at the Sheriff's Office did
 17 not constitute a matter of public concern. Complaints over internal office affairs are not
 18 protected by the First Amendment. *See Weisbuch v. County of Los Angeles*, 119 F.3d 778, 782
 19 (9th Cir. 1997). As the Supreme Court explained in *Connick v. Myers*, 461 U.S. 138, 147, 103 S.
 20 Ct. 1684:

21 when a public employee speaks not as a citizen upon matters of public concern,
 22 but instead as an employee upon matters only of personal interest, absent the most
 23 unusual circumstances, a federal court is not the appropriate forum in which to
 24 review the wisdom of a personnel decision taken by a public agency allegedly in
 25 reaction to the employee's behavior.

26 Indeed, not all issues which relate to a public agency constitute matters of public concern. "To
 27 presume that all matters which transpire within a government office are of public concern would
 28 mean that virtually every remark ... would plant the seed of a constitutional case." *Id.* at 149, 103
 S.Ct. at 1691. In the case at bar, Plaintiff's speech regarding the firearms training at the Sheriff's

Office is a completely internal office affair and does not relate to a matter of political, social, or other concern to the community. Additionally, any comments regarding the firearms policy pertain to Plaintiff's own personnel dispute and grievance as evidenced by the fact that his suspension arose from his accidental discharge of a firearm during training, and therefore his speech did not address matters of public concern.

Furthermore, complaints about mismanagement of command level personnel in a police department, training, internal department politics, favoritism, transfers, *training*, personnel relationships, employment policies, and promotional exams are among matters considered to be of private, rather than public concern. *See Gros v. Port Washington Police Dist.*, 944 F. Supp. 1072, 1079 (E.D.N.Y.1996) (emphasis added). Additionally, Plaintiff's First Amended Complaint contains only conclusory allegations that the firearms policy at the Sheriff's Office is illegal. *See* Plaintiff's First Amended Complaint, p.3. Plaintiff's amended complaint fails to identify any statute which is implicated by the firearms policy, and he also fails to allege how the policy violates the law. Accordingly, this Court should not accept those statements as true when making a determination on Defendants' motion to dismiss.

Lastly, the fact that Plaintiff expressed his alleged concerns regarding his personnel dispute to a limited audience indicates that he did not engage in protected speech. The Ninth Circuit has held that a plaintiff's motivation and chosen audience are among the factors to be considered in determining whether the speech addresses a matter of public concern. *See Johnson v. Multnomah County*, 48 F.3d 420, 425 (9th Cir. 1995). In the instant matter, Plaintiff expressed his concerns for the purpose of addressing his personnel dispute, and he communicated his concerns to a very limited number of individuals at the Sheriff's Office. Plaintiff's First Amended Complaint does not indicate that Plaintiff expressed his concerns to anyone other than the individuals who were present at the July 24, 2008 grievance meeting, which was held to address Plaintiff's potential suspension. The fact that Plaintiff's speech pertained to his grievance and was communicated to a limited audience, weigh heavily against a finding that his speech addressed matters of public concern.

Based upon the foregoing, Plaintiff's speech failed to address a matter of public concern.

1 Accordingly, Plaintiff's First Amended Complaint fails to state a claim for First Amendment
2 retaliation against all Defendants.

3 **(2) Plaintiff's Alleged Protected Speech was Not a Substantial or Motivating**
4 **Factor for Any Adverse Employment Action**

5 Even if this Court were to determine that Plaintiff engaged in protected speech, his
6 retaliation claims fail because the alleged protected speech was not a substantial or motivating
7 factor for the decision to suspend Plaintiff. *See Eng v. Cooley*, 552 F.3d 1062, 1071 (9th Cir.
8 2009). In the case at bar, based on the information obtained during the investigation, Lieutenant
9 Antinoro recommended that Plaintiff receive a two (2) day suspension for the incident. *See*
10 Plaintiff's First Amended Complaint, p.2. The investigation continued when Plaintiff appealed
11 the suspension and attended a grievance hearing on or about July 24, 2008. *Id.* at 2-3. Plaintiff
12 expressed his objections regarding the firearms training policy and the manner in which the
13 Sheriff's Office conducted the investigation into his conduct. *Id.* at 3. In addition, Plaintiff's
14 representative made statements regarding the overtime policies, which were completely unrelated
15 to the Plaintiff's suspension. *Id.* Ultimately, Sheriff Miller ratified Lieutenant Antinoro's
16 recommendation and imposed a two (2) day suspension against Plaintiff. *Id.* at 2.

17 Common sense dictates that if any action is taken before a plaintiff engages in speech, it
18 must follow that the speech could not be a substantial or motivating factor for the alleged adverse
19 action. In the instant matter, Lieutenant Antinoro recommended the suspension prior to the time
20 that Plaintiff expressed his concerns to the Sheriff's Office. Plaintiff engaged in speech after
21 Lieutenant Antinoro made the recommendation, but before Sheriff Miller made the final
22 determination with respect to the discipline. *Id.* at 3. Furthermore, it is evident from the face of
23 Plaintiff's First Amended Complaint that Lieutenant Antinoro's recommendation to suspend
24 Plaintiff was based solely upon the accidental discharge of his firearm, and had absolutely
25 nothing to do with his speech. *Id.* at 2. Other than Plaintiff's conclusory allegations, his
26 complaint does not contain any factual allegations which would indicate that Lieutenant
27 Antinoro's actions were pretext for retaliation.

28 Plaintiff's First Amended Complaint also fails to demonstrate that Plaintiff's speech was

the substantial or motivating factor of Sheriff Miller's decision to ratify his suspension. Plaintiff unsuccessfully argues that the temporal proximity between Plaintiff's alleged protected activity and any alleged action is evidence of retaliation. The Ninth Circuit has held that length of time between the protected activity and the alleged adverse employment action will not be considered without regard to its factual setting. *See Coszalter v. City of Salem*, 390 F.3d 968, 978 (9th Cir. 2003). In this case, Plaintiff happened to engage in speech at a time when Plaintiff was already under investigation for dangerous conduct. Indeed, the Lieutenant Antinoro had already recommended the alleged adverse employment action before Plaintiff engaged in any speech. Accordingly, Plaintiff's argument with respect to temporary proximity is not persuasive under the factual circumstances of this case. To the extent that Plaintiff is arguing temporal proximity with respect his departure from the Sheriff's Office, such a proposition fails because he was not terminated from his position, but instead resigned on his own volition.

Lastly, but not least importantly, it is evident from the face of the amended complaint that Plaintiff was suspended for his own actions, which consisted of the dangerous discharge of his firearm. Such action compromised the safety of the other officers within the sheriff's Office. Plaintiff's First Amended Complaint does not contain any factual allegations which would indicate that Sheriff Miller's decision to suspend Plaintiff had anything to do with Plaintiff's speech. Additionally, Plaintiff's Complaint is void of any factual allegations where Defendants opposed his speech.

Based upon the foregoing, it is clear that Plaintiff's speech was not a substantial or motivating factor for the alleged adverse employment action.

D. Plaintiff's Claims Premised Upon Violations of the Family Medical Leave Act Must be Dismissed

When Plaintiff filed his First Amended Complaint he improperly inserted claims against Storey County and Sheriff Miller because the claims are time-barred by the applicable statute of limitations. A claim for violations of the Family Medical Leave Act ("FMLA") must be brought within two (2) years of the alleged violation. *See* 29 U.S.C. § 2617(c)(1). 29 U.S.C. § 2617(c)(1) specifically provides, "[e]xcept as provided in paragraph (2), an action may be

brought under this section not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought.” In Plaintiff’s First Amended Complaint, he alleges that his FMLA rights were violated when he was disciplined for taking leave in November, 2007. *See* Plaintiff’s Complaint, p.2. Plaintiff filed the instant lawsuit on February 25, 2010. Plaintiff did not assert a cause of action for violations of his FMLA rights until he filed his First Amended Complaint on March 22, 2010. Even if Plaintiff’s FMLA claims relate back to the date of his original complaint pursuant to FRCP 15(c), he still failed to timely file his claim. At the latest, Plaintiff was required to file his claims premised upon violations of FMLA before October 1, 2009. Because Plaintiff’s claims are barred by 29 U.S.C. § 2617(c), they must be dismissed.

E. This Court Should Not Exercise Jurisdiction Over Plaintiff’s State Law Claims

Respectfully, because all of Plaintiff’s federal claims should be dismissed, this Court should not exercise jurisdiction over his state law claims. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726, 86 S. Ct. 1130, 1139 (1966). Nevertheless, even if the Court exercises supplemental jurisdiction over Plaintiff’s state law claims, independent grounds for dismissal exist.

F. Plaintiff’s Tortious Discharge Claim Must be Dismissed

As discussed in Defendants’ motion to dismiss, a claim for tortious discharge may not be based on a mixed-motives theory. *See Allum v. Valley Bank v. Nevada*, 114 Nev. 1313, 970 P.2d 1062 (1998). In other words, Plaintiff’s claim should be dismissed because his alleged speech was not the sole reason for his alleged constructive discharge. Based on the allegations contained in Plaintiff’s amended complaint, it is clear that the Sheriff’s Office initiated an investigation into Plaintiff’s conduct for the discharge of a firearm at the shooting range, and Plaintiff ultimately received a two (2) day suspension for that conduct. *See* Plaintiff’s First Amended Complaint, p.2-3. Plaintiff effectively admits that he was suspended for the discharge of his firearm, and not his speech, when he argues that the discipline was unwarranted because he did not negligently handle his weapon. This should end the discussion because a Plaintiff cannot prevail on a claim

1 for tortious discharge when the constructive discharge was based on a mixture of legitimate
 2 reasons and legally prohibited reasons. Together, the facts contained in Plaintiff's First
 3 Amended Complaint and the admission by Plaintiff that he was suspended in part for the
 4 discharge of his firearm forecloses Plaintiff's ability to recover under a tortious discharge theory.

5 **(1) Plaintiff's Resignation was not Induced by Actions that Violate Public Policy**

6 Yet another reason why Plaintiff's tortious discharge claim should be dismissed is that
 7 Plaintiff's resignation was not induced by actions which violate public policy. None of the
 8 actions by Defendants violated public policy as defined by cases such as *Wayment v. Holmes*,
 9 112 Nev. 232, 237, 912 P.2d 816, 819 (1996). As stated in Defendants' motion to dismiss, a
 10 claim for tortious discharge is reserved for extreme situations which do not exist in this case. *See*
 11 *Allum*, 114 Nev. at 1313, 970 P.2d at 1062. The employer must have engaged in conduct that is
 12 outrageous and violates public policy. *See State v. Eighth Judicial Dist. Ct.*, 118 Nev. 140, 151,
 13 42 P.3d 233, 240 (2002). Plaintiff's argument that the investigation and suspension of Plaintiff
 14 violated public policy is absurd. Contrary to what Plaintiff would have this Court believe, the
 15 Sheriff's Office may have violated public policy if it had neglected to discipline Plaintiff for the
 16 dangerous discharge of his firearm. If the Sheriff's Office failed to discipline Plaintiff for his
 17 conduct it would have have created a working environment that would have been unreasonably
 18 dangerous to its employees. Instead, the Sheriff's Office took steps to ensure the safety of its
 19 officers, which is consistent with public policy. Because Plaintiff's amended complaint fails to
 20 demonstrate that the Sheriff's Office violated important public policy under Nevada law, the
 21 claim should be dismissed.

22 **(2) A Reasonable Person in Plaintiff's Position Would Not Have Resigned**

23 The final reason why Plaintiff's tortious discharge claim should be dismissed is that
 24 Plaintiff was not constructively discharged. The Sheriff's Office did not create working
 25 conditions that were so intolerable that a reasonable person in Plaintiff's position would have felt
 26 compelled to resign. The Ninth Circuit has held that single, trivial, or isolated acts of misconduct
 27 are insufficient to support a constructive discharge claim. *See King v. AC & R Advertising*, 65
 28 F.3d 764, 767-768 (9th Cir. 1995). Plaintiff attempts to extract arguments that are inconsistent

1 with the factual allegations in his amended complaint when he argues that he suffered a
 2 continuity of repetitious adverse employment actions. *See* Plaintiff's Opposition, p. 7. Even
 3 when all of Plaintiff's allegations are taken as true, a simple reading of his First Amended
 4 Complaint reveals that the alleged acts were isolated and few in number. This being so, Plaintiff
 5 cannot establish that he was constructively discharged. It is important to note that Plaintiff never
 6 made any complaints regarding the alleged adverse actions until he was under investigation and
 7 faced possible suspension. Plaintiff's reliance of *Draper v. Coeur Rodchester, Inc.*, 147 F.3d
 8 1104, 1110 (9th Cir. 1998) and *Nolan v. Cleland*, 686 F.2d 806, 813 (9th Cir. 1982) is misplaced.
 9 Unlike the case at bar, the plaintiff in *Draper* was subjected to continuous sexual harassment and
 10 was the target of graphic sexual remarks. In *Nolan*, the plaintiff was the victim of constant sex
 11 discrimination which prevented her from advancing in her employment. Unlike this case, the
 12 plaintiffs in both *Draper* and *Nolan* filed complaints regarding their treatment and the conduct
 13 continued to occur. In the case at bar, Plaintiff never made any complaints regarding the alleged
 14 adverse actions, and at the most, Plaintiff's allegations identify two (2) incidents which occurred
 15 within the limitations period. This further demonstrates that the working conditions of Plaintiff's
 16 employment was not intolerable.

17 Plaintiff has alleged that during the July 24, 2008 grievance meeting Sheriff Miller told
 18 Plaintiff that he "was dangerously close to being terminated." As stated in Defendants' motion
 19 to dismiss, when Sheriff Miller made that statement he was simply giving Plaintiff an
 20 opportunity to improve his conduct. Sheriff Miller never indicated that termination was
 21 imminent, and Plaintiff fails to set forth any factual allegations which would demonstrate that
 22 Plaintiff's termination was indeed forthcoming. Moreover, courts have held that allegations
 23 which indicate that an employer intentionally criticized an employee's job performance and made
 24 conditional threats of termination if performance did not improve, is insufficient to prove
 25 constructive discharge. *See Spence v. Maryland Casualty Co.*, 995 F.2d 1147, 1156 (2d Cir.
 26 1993); *see also Hockeson v. New York State office of General Services*, 188 F. Supp. 2d 215, 220
 27 (N.D.N.Y. 2002) (holding that allegations that employer made statements to employee that she
 28 had to "sink or swim" and that "one more step and she was out the door" were insufficient to

demonstrate constructive discharge). Like in *Spence*, Plaintiff was simply given an opportunity to improve his behavior. Accordingly, a reasonable person in Plaintiff's position would not feel compelled to resign.

Based upon the foregoing, Plaintiff's claim for tortious discharge must be dismissed because Plaintiff is not entitled to relief.

G. Plaintiff's Defamation Claim Must be Dismissed

When Plaintiff filed his First Amended Complaint he improperly inserted a claim for defamation against Sheriff Miller. Plaintiff's defamation claim must be dismissed because it is barred by the applicable statute of limitations. A claim for defamation must be filed within two (2) years. *See* NRS 11.190(4)(c). In Plaintiff's First Amended Complaint, he alleges that he was defamed when Sheriff Miller gave Plaintiff a statute of the hind end of a horse in December, 2007. *See* Plaintiff's First Amended Complaint, p.2. As stated above, Plaintiff filed the instant lawsuit on February 25, 2010. Plaintiff did not assert a claim for defamation until he filed his First Amended Complaint on March 22, 2010. Even if Plaintiff's defamation claim relates back to the date of his original complaint pursuant to FRCP 15(c), his claim would still be untimely. Said incident occurred more than two (2) years prior to the filing of Plaintiff's complaint, and such actions are not actionable as conceded by Plaintiff. *See* Plaintiff's Opposition, p.7 n.1. Because Plaintiff's claim is barred by the provisions of NRS 11.190(4), his claims must be dismissed as he fails to state a claim upon which relief may be granted.

Even if the allegations for defamation were considered by this Court, Plaintiff would not be entitled to relief. To state a claim for defamation a plaintiff must prove the following elements: (1) that the defendant made a false and defamatory statement concerning the plaintiff, (2) that the defendant published the statement to a third party without privilege, (3) that there was fault amounting to at least negligence by the defendant; and (4) that the statement was either per se defamation, or the defamation caused special harm. *See Lubkin v. Kunin*, 117 Nev. 107, 111, 17 P.3d 422, 425 (2001). A plaintiff must demonstrate that the defendant made a false statement of fact, as opposed to a statement of opinion. *See Miller v. Jones*, 114 Nev. 1291, 1296, 970 P.2d 571, 575 (1998). In the case at bar, Plaintiff's amended complaint is void of any allegations that

1 Sheriff Miller made any false and defamatory statements whatsoever concerning Plaintiff. Even
 2 if the act of giving Plaintiff a statue is considered to be a statement (which it is not), it would be
 3 nothing more than a statement of opinion, and therefore is not actionable. *Id.* Any argument to
 4 the contrary would be disingenuous. An argument that Sheriff's Miller's actions constituted a
 5 statement of fact would effectively mean that Sheriff Miller was communicating that Plaintiff
 6 was indeed the hind end of a horse. Such an argument would be ridiculous. This further
 7 demonstrates how Plaintiff's defamation claim fails.

8 Respectfully, Plaintiff's defamation claim must be dismissed because the allegations
 9 contained in Plaintiff's complaint would not entitle him to relief.

10 **III. CONCLUSION**

11 Based upon the foregoing, Defendants respectfully request that this Court dismiss
 12 Plaintiff's First Amended Complaint in its entirety because Plaintiff fails to state any claims upon
 13 which relief may be granted.

14 DATED this 7th day of May, 2010.

15
 16 THORNDAL, ARMSTRONG,
 DELK, BALKENBUSH & EISINGER

17
 18 By: /s/ Brent T. Kolvet

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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of Thorndal, Armstrong, Delk, Balkenbush & Eisinger, and that on this date I caused the foregoing **DEFENDANTS' REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT PURSUANT TO FRCP 12(b)(6)** to be served on all parties to this action via the U.S. DISTRICT COURT's CM/ECF Electronic Filing System, fully addressed as follows:

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Attorneys for Plaintiff

DATED this 7th day of May , 2010.

/s/ Mary C. Wilson

An employee of Thorndal, Armstrong,
Delk, Balkenbush & Eisinger